No. 15468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE RAMIREZ, MEYER GOODMAN, MICHAEL GULLON, BILL H. FREEMAN and ROBERT E. MILLER,

Appellants,

vs.

REFUGIO GONZALEZ LOZOYA,

Appellee.

REPLY BRIEF OF APPELLANTS.

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REPLY BRIEF OF APPELLANTS.

I.

Criminal Trial Terminated.

In reply to the extravagant claims of appellee's Brief, appellants desire to point out that the federal court trial of appellee terminated with his acquittal on July 20, 1956. Under the Constitution and laws of the United States that terminated the matter for all time. The Government did not have a right of appeal against the court's finding that the defendant was not guilty. The court had no further use for any evidence which was admitted at the trial, including any tangible evidence which was introduced therein. Thereafter, on August 10, 1956, a complaint as to a violation of State laws was made to the District Attorney for the County of Los Angeles,

California, and the State, in accordance with its judicial processes, had the matter set for preliminary hearing on January 11, 1957. On the 4th day of January, 1957, the Honorable Thurmond Clarke, United States District Judge, issued an order to show cause against appellants, which was set for hearing on January 10, 1957, one day before the proposed commencement of the preliminary hearing in the State Court. The order to show cause was entitled with the caption and number of the federal court action which had, as previously indicated, terminated in July of 1956, some six months before. At the so-called "hearing" on January 10, 1957, no evidence was presented. The court indicated that it had not had an opportunity to read the brief of appellants, which was presented in opposition to the petition of appellee.

II.

Decision Made Before "Hearing."

The court also indicated that it had already prejudged the matter and had made up its mind and had written an order which it was going to have entered.

> "The Court: Mr. Bender, can't you take the court's word for it that I worked all weekend on this particular case?
>
> Mr. Bender: Yes, your Honor, but you were just handed the brief in opposition.
>
> The Court: Yes, but I am a graduate of a law school, you know. I say I worked all weekend on this particular case and researched the matter. I spent hours on it.
>
> Mr. Bender: Yes, your Honor.
>
> The Court: And the court feels very keenly about this case.

Mr. Bender: Your Honor, from the respondents' position it would be a wrongful thing for the court to enjoin the respondents from testifying in other proceedings elsewhere.

The Court: I know you feel that way, but this court feels on this matter of the order to show cause that when the court has tried this defendant and acquitted the defendant, that should end the matter. The court is going to read its written order at this time, and the court will file an opinion. I am sorry that I disagree with you, but that is the function of the court."

The foregoing indicates that the Judge had prejudged the matter and made up his mind prior to reference to the appellants' trial brief or to any evidence on the matter. In fact, *no evidence was taken by the court,* the entire matter being handled on the basis of the petition of appellee and the argument of counsel at the time of the so-called "hearing."

III.

Findings Unsupported by Evidence.

The petition of appellee complains of a violation of his constitutional rights under the Fifth and Fourteenth Amendments to the Constitution. No mention therein is made of any torture or beatings. Nevertheless, in the court's written Order enjoining the appellants from testifying, the "findings of fact," although not separately set out, were that from the time of appellee's first detection, including his arrest, and interrogation and search and seizure of the subject of the offense, consisting of 9½ pounds of marihuana, incarceration and interrogation, appellee was subjected to beatings and torture by

agents and employees of the United States Government. No such facts were before the court on this separate hearing on the order to show cause, and such findings were not even responsive to, or were the alleged facts included in, the petition of appellee which initiated the hearing on the order to show cause.

Nevertheless, the true intent and character of appellee's action is clear from his brief (p. 14) in which he alleges that an eardrum was broken, as well as other claims and conclusions. The only proof that any injury at all occurred would have to come from the trial transcript of the federal criminal trial which was not before the court in this "hearing." An examination of that transcript [Tr. p. 412], as reproduced in the transcript of record in this case, indicates that this was the allegation made by appellee while he was on the witness stand under a criminal indictment. Appellee concludes that there was a necessary and inherent finding of fact that the entire testimony of appellee was true in his criminal trial. If this were an appeal from the criminal trial, the Government would concede that appellee's position, he being the prevailing party, would have some substance. However, in the instant matter, since there was no evidence before the court upon which any finding could have been made, appellee does not stand in the favored position which he seeks to occupy. *Parks v. Ross,* 52 U. S. 362, 372; *Northwestern Electric Co. v. Federal Power Comm.,* 134 F. 2d 740, affd. 321 U. S. 119 (9 Cir., 1943); *Arena Co. v. Minneapolis Gas Co.,* 234 F. 2d 451 (8 Cir., 1956); *Controller of California v. Lockwood,* 193 F. 2d 169, 172 (9 Cir., 1951). Appellee, in his argument, gets a lot of mileage out of the testimony which he gave at the trial and the candid ad-

missions by some of appellants of their activities at the time they attempted to book appellee. His distorted version of the facts now indicates that he was handcuffed to a chair during the alleged beating. The facts adduced at the federal trial do not indicate that such was the case. Rather they indicate that he was a reluctant arrestee and that he had to be subdued in order to take his fingerprints. He now says that "guilty parties" (who did not have a trial to ascertain their guilt of his alleged charges) may not profit from their own wrong. He does not indicate how the appellants, who are narcotics officers charged with the prevention of traffic in marihuana and other narcotics, would profit from the trial of appellee on a State charge of possession of marihuana. He also makes the statement in his brief (p. 14) that the "guilty" Government agents should not be allowed to proceed in another forum. It is fundamental that a Government agent does not proceed in court, but that the action in this instance is carried on by the People of the State of California.

IV.

Injunction Derogates Reserved State Powers.

Appellants are certainly within their rights when they claim that the federal judge has no right or duty to interfere with or restrain the legitimate and normal processes of law enforcement in the State of California. No question of due process of law is involved in the instant set of facts. Appellee would subject, by prior restraint, the operation of State law enforcement agencies to federal control, completely ignoring the constitutional reservations of power to the states. (U. S. Const., Tenth

Amend.) His position presumes that state courts are not competent to inquire into alleged wrongs and to deal with them fairly, and gives the federal court power to prevent state courts from even hearing evidence in a matter which is related to a prior federal court trial. This, appellee contends, is an inherent power of the federal District Courts, notwithstanding the limited jurisdiction which has historically been ascribed to such courts. *The Gerald A. Fagan,* 47 F. 2d 215, affd. 284 U. S. 263 (2 Cir., 1931); *Concord Casualty & Surety Co. v. United States,* 69 F. 2d 78, 80 (2 Cir., 1934). Title 28, U. S. C., Section 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This is not to be confused with the right of federal *appellate* courts to review, on due process grounds, the judgments of state courts *after trial.*

Appellee concludes, without citation of supporting evidence, that appellants were "concerned with eliciting a confession by beatings and torture, rather than in booking appellee." (Appellee's Br. p. 19.) This is a completely distorted version of the facts which were before the federal trial court when it was hearing the criminal trial. The testimony in that trial was of a resistance to being fingerprinted on the part of the appellee. Most of the appellants were not even present at that time. Furthermore, it does not necessarily follow, without special findings of fact by the trial court, that any particular testimony of either appellants or appellee was found to

be true, unless that testimony was essential to the finding of innocence by the trial court in the federal criminal trial. *Cf. Hammel v. Little,* 87 F. 2d 90 (D. C. Cir., 1936); *New York Life Ins. Co. v. Murdaugh,* 94 F. 2d 104 (4 Cir., 1938); *United States v. Bridges,* 123 F. Supp. 705 (D. C. Calif., 1954); *Melvering v. Mitchell,* 303 U. S. 391; *Boundary County, Idaho v. Woldron,* 144 F. 2d 17, cert. den. 324 U. S. 843 (9 Cir., 1944) (see also 49 F. Supp. 600). Previous judge entered an order without first entering findings of fact. Later, cause was resubmitted to another judge. Held: Previous ruling not binding on second judge. Here, there was no evidence before the court on the hearing on order to show cause which would support the findings which were made at that time.

Appellee cites the case of *McNabb v. United States,* 318 U. S. 332, and quotes as follows:

> "Judicial supervision of the administration of criminal justice in the *federal courts* implies the duty of establishing and maintaining civilized standards of procedure and evidence." (Emphasis added.)

Appellants have no quarrel with this quotation, but what is involved in this action is the supervision of the administration of criminal justice in the *state courts.* The duty of the federal courts in that regard is not clear and not supported by the citations of appellee. If the appellee is denied due process in a state court trial, then after the trial his eventual appeal could be to a proper United States appellate court which could consider the lack of due process.

V.

No Evidence to View Favorably.

Appellee's second point alleges that the evidence "must be viewed most favorably to the judgment appealed from." Appellant respectfully inquire: "What evidence"? It certainly has always been true in civil matters that the party who lost in the trial court can point out and assert the factual deficiency to support any findings made by the trial court. *Parks v. Ross,* 52 U. S. 362, 372; *Northwestern Electric Co. v. Federal Power Comm.,* 134 F. 2d 740, affd. 321 U. S. 119 (9 Cir., 1943); *Arena Co. v. Minneapolis Gas Co.,* 234 F. 2d 451 (8 Cir., 1956); *Controller of California v. Lockwood,* 193 F. 2d 169, 172 (9 Cir., 1951). The Government was not permitted to present evidence in the order to show cause hearing. The court's mind was made up, as has been indicated *supra.* Certainly appellants have a right to a fair trial, and that goes to each of the appellants separately. It must be borne in mind that *different issues* were presented to the trial court by virtue of the petition and order to show cause, and *appellants certainly had a right to present any evidence they had on those issues.*

Appellee has deliberately, or erroneously, misquoted from the trial transcript in the federal criminal action [Tr. p. 364] by stating that "Agent Gullon paused *and hedged.*" (Italics added by appellants, not in trial transcript.) This type of treatment has characterized the entire approach to this matter, appellee making reckless conclusions and assertions as to what was before the trial court. The court itself, which is supposed to be an impartial arbiter of the hearing on order to show cause, had prepared its final order without permitting the ap-

pellants to make any case whatsoever in their own behalf. His decision was reached before the time for filing appellants' answer had passed and before the day set for hearing. [Tr. pp. 458-566.]

VI.

New Issues Presented by Order to Show Cause.

Appellants repeat that there was absolutely no evidence before the court upon which to base findings and the order which was issued. Evidence at the criminal trial was necessarily restricted to the issues before the court at that time, especially the evidence which the Government could present in its prosecution of appellee. New issues are before the court on the order to show cause, but neither side presented, nor was permitted to present, any evidence thereon. Hence, there was no evidence before the trial court. Thus appellee's cases concerning the finality of findings of fact of the trial court are inapplicable to the issues now presented to this Honorable Court.

There was no evidence of beatings or participation therein by appellants Goodman, Ramirez and Freeman before the federal court in the trial of the criminal matter, and, of course, no evidence whatsoever before it on the order to show cause. Even appellee in his wildest assertions in the federal criminal trial did not attempt to include these named individuals in his charges.

Appellants' appeal is not based on "their version of the evidence'" as claimed by appellee (Appellee's Br. p. 22, lines 4 and 5) because there is no evidence. However, appellants discussed certain of the evidence which was submitted in the federal criminal trial, a trial for an

alleged narcotics offense in which the issues were different and in which Government agents were not on trial, and therefore had no opportunity to defend themselves. If this is due process to appellants in an order to show cause hearing in which they are "convicted" of torture and beatings, and accords with the traditional American concept of opportunity to be heard and to defend oneself, then it is news to this writer.

VII.

Court Has Duty to Take Evidence.

Appellee suggests that appellants did not request the taking of testimony. Since when is it necessary to ask that evidence be taken upon charges which are made against individuals and to support the allegations of a moving party? Appellants have always understood that a person charged with the commission of some sort of offense was entitled to have the evidence presented against him prior to a judgment being rendered. Can appellants be accused of defaulting when the trial judge would not even pay attention to their timely filed trial brief? Are they required to go through useless motions? Are they required to defend themselves when they are not even charged in the petition of appellee with any wrongful acts? Appellee suggests

> "that the learned trial judge was not required to *rehear (sic)* the testimony in order to issue the order appealed from." (Appellants' Br. p. 22, lines 21-22.)

And then concludes:

> ". . . that the court was entirely cognizant of the facts." (Appellee's Br. p. 22, lines 21-22.)

Appellee's unique suggestion appears to be, since the court had heard some evidence in a different trial some six months before, that it now could be taken to be cognizant of "the facts." He glibly passes over the fact that in his petition he did not allege torture or beatings or any right to redress on that account, but was claiming instead that he was being placed in double jeopardy.

VIII.

Appellee Abandons Position in Trial Court.

He just as glibly now abandons his position regarding double jeopardy (Appellee's Br. p. 40, lines 21-22) so that now the matter has changed from a proceeding alledging that appellee was denied due process in that he was being subjected to double jeopardy, which the appellants' citations have shown clearly not to be the fact (see Appellants' Op. Br. Point No. 2), and now assumes a position not even taken in his petition, but erroneously adopted by the federal district judge in his order entered at the time of the "hearing" on the order to show cause. Again appellants respectfully point out that the matters at issue before the federal District Court in its federal criminal trial were not the same matters which would necessarily be in issue under the appellee's petition which initiated the order to show cause hearing.

IX.

No Fruits of Alleged Conduct.

There was no evidence before the court at the time it made its order in apparent response to the order to show cause hearing. The discussion of evidence which has been engaged in in the briefs was that which was before the trial court at Lozoya's trial on the marihuana charges,

not that which was at issue on the order to show cause hearing. Again, appellants point out that the judge heard that evidence six months before, and unquestionably his memory is subject to the same shortcomings as those of many individuals.

Appellee points out (Appellee's Br. p. 24, line 13), irrespective of the alleged treatment by appellants, he "refused to make any admissions." Thus, if beatings were administered by some of appellants, it is clear that no fruits of the incident were forthcoming. There was no illegally obtained evidence. There were no confessions. There was no admission. And finally, there was no evidence before the trial court. Therefore there was nothing upon which the trial judge could base his alleged findings of fact.

X.
No Joint Action.

The order by the trial court purports to find that there were beatings and torture. There is no indication in the transcript of the criminal trial of any participation therein as to Agents Goodman, Ramirez or Freeman. They are now roped into the alleged acts of the officer officers, Gullon and Miller, on the ground that they were participating in the surveillance and arrest of appellee. The finding of such vicarious liability for the wrongs of others is not consonant was the standards of due process which should be accorded all of the appellants just as surely as it should be accorded the appellee. *Cf. Rich v. Warren,* 123 F. 2d 198 (6 Cir., 1941); *Fidelity & Casualty of New York v. Brightman,* 53 F. 2d 161 (8 Cir., 1931). He wants to parlay the alleged wrongs of some

appellants into complete freedom from any charge of criminal misfeasance irrespective of his very apparent implication therein. (Note, there is no claim of innocence of the State crime anywhere in appellee's Brief or other documents.) That appellants were engaged in the joint activity of attempting to impede the violation of the narcotics laws is admitted. This is not to say that appellants who had no part in alleged "beatings and torture" counselled, assisted in, or conspired to treat appellee in that manner. Appellants Goodman, Romirez and Freeman were doing their duty as prescribed by their superiors and in accordance with the law. If some of their associates did commit wrongful acts, the named individuals are certainly not responsible therefor unless they advised or assisted therein in some manner. *Cf. Rich v. Warren,* 123 F. 2d 198 (6 Cir., 1941); *Fidelity & Casualty of New York v. Brightman,* 53 F. 2d 161 (8 Cir., 1931). No such proof was presented even in the federal criminal trial of Lozoya.

Whatever other rights of appellee were offended by the alleged beatings and torture, if such were the case, he had due process in his federal criminal trial, and is guaranteed due process in the State courts of the State of California, under both the California and the United States Constitutions.

XI.

Separation of Powers Doctrine Applies.

Federal courts do not have *general* supervisory control over Government agents. (But *cf. Rea v. United States,* 350 U. S. 214, 76 S. Ct. 292.)

The federal courts have historically been accorded the pre-eminent and predominant position in judicial matters

as distinguished from executive and legislative. They have not, however, occupied such position in connection with matters under the direct supervision and control of the executive. This is the well known doctrine of separation of powers. It is true that the courts have recently stated that they have such supervisory control where Government agents seek to use illegally obtained evidence in a state trial. *Rea v. United States,* 350 U. S. 214, 76 S. Ct. 292. Such is not the present case.

Assuming *arguendo* that federal courts have such *general* supervisory control, the cases relied on by appellee in his Brief involve illegal searches and seizures, and resultant illegally obtained evidence. No such situation is here presented. No federal rule has been violated in the alleged actions of the appellants, if the allegations of their actions are proved to be true by competent evidence. This distinguishes the *Rea* case, *Rea v. United States,* 350 U. S. 214, 76 S. Ct. 292.

XII.

Federal Court's Action Impedes State Courts.

The federal District Courts certainly have no supervisory control over state courts. The instant proceeding is an unwarranted interference with the operation of the state courts, and with the executive of the states in their right to control and prosecute illicit traffic in marihuana. Again this distinguishes the instant situation from that in *Rea.* In that regard the attention of the court is respectfully directed to the language of the order restraining federal officers, as issued by the learned trial judge, which

> "permanently enjoined from testifying concerning the subject of said detention, apprehension, arrest, in-

terrogation and the search and seizure of said 9½ pounds of marihuana," all of appellants, "and said parties, together with their agents, associates and any parties having the said 9½ pounds of marihuana are ordered to forthwith return and deposit the same with the Clerk of this courtroom, and *all persons are restrained from ordering and compelling the parties enjoined herein, from testifying in any proceeding.*" (Emphasis added.)

XIII.

Appellants Denied Due Process.

Appellee in his Brief (p. 29, lines 6-10) aptly cites the language of Douglas, J., in *Williams v. United States,* 341 U. S. 97, but states that it governs the conduct of appellants. The language follows: "It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court." Appellants respectfully point out that in this proceeding on the order to show cause they are the persons who were tried and convicted without hearing. The federal proceeding had terminated as to appellee. Appellants are the ones who got the kangaroo court and were not permitted to submit evidence, nor was their brief in opposition even read or considered by the trial court.

Again, on page 31 of appellee's Brief, lines 4 through 11, appellee cites more helpful language from *Rea v. United States,* 350 U. S. 214, as follows:

> ". . . It was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the *result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in*

connection with the execution of a process of the court. No injunction is sought against a state official." (Emphasis added.)

The petition which gave rise to the order of the District Court does not cite any "alleged unreasonable exertion of authority in connection with the execution of a process of the court." This would seem to undermine the appellee's contention that the court has inherent authority in the matter before it to issue the injunction.

And whereas in the *Rea* case, *supra,* no injunction was sought against a state official, the injunction here issued purported to enjoin and restrain all persons from ordering and compelling the parties (appellants) enjoined herein, from testifying in any proceeding. That would enjoin them from testifying in a state court and would inferentially enjoin state officers from issuing subpoenas and compelling them to testify. All of this despite the fact that none of the evidence was held to be illegal in any way.

XIV.

Appellee Has Available Proper Remedies.

No one sanctions or approves the conduct alleged as to certain of the appellants, if it occurred. It is easy for one accused of crime to allege that he has been mistreated by the officers. Where no evidence is obtained by virtue of such alleged acts, proper procedure to vindicate the wrong would be by way of a complaint against a wrongdoer under existing state or federal laws, not by interference with the functions of state law enforcement merely on the basis of the accusations of one individual who has a particular interest in the proceedings.

Appellee alleges (Appellee's Br. p. 33, lines 15-20) that to deny the injunction in this case would have the effect of annulling the vindication of the defendant in the federal court, and would stultify the fundamentals of liberty and justice secured by the Fourteenth Amendment. These stirring phrases are a conclusion which is clearly not true. The vindication of defendant in the federal court will stand for all time. The question now is whether or not the State court is entitled to proceed for an alleged violation of State laws.

Appellants are indebted to appellee for the citation of *McNabb v. United States,* 318 U. S. 332, 340 (Appellee's Br. p. 34, line 15, through p. 35). The United States Supreme Court is here clearly defining a difference in federal court's supervisory control of federal officers in federal matters and its supervision when they are involved in state court matters. That distinction gives little comfort to appellee's position.

XV.

Marihuana No Longer Subject to Court Control.

The marihuana was not subject to further control by the court after the appellee was acquitted in the federal trial. There was no longer any concern by the court of the marihuana as evidence since the United States of America has no appeal in such acquittal. Appellants adhere to their position as stated in the opening brief, notwithstanding the criticisms of that position entertained by appellee in his Brief under Point Six at page 37, *et seq.*

Appellee attempts to confuse and apply the legitimate rules preventing a return of contraband to the person who

possessed it, *e.g.*, marihuana, to the individuals from whom it was obtained (even if so obtained illegally), with the right and duty of law enforcement officials to cooperate with and make evidence available to other agencies of law enforcement and to other courts. This rule is undoubtedly invoked to protect society from further misuse of the contraband, or further danger from it, and the rule should not be strained to defeat the legitimate use of the evidence as such in a trial before a competent tribunal. Furthermore, the executive is charged with the destruction of contraband, as indicated in the appellants' Opening Brief.

There is no problem of an illegal seizure as in the *Rea* case. The appellants deny the allegation that the withdrawal was not done pursuant to order or decree of any court of the United States having jurisdiction thereof, as alleged by appellee on page 40 of his Brief. As set out in the Opening Brief of appellants, the withdrawal was made pursuant to the rule of the local federal District Court. This provides for the withdrawal of all exhibits after time for appeal has run in the event an appeal is available. Rule 20(a), Local Rules of United States District Court for the Southern District of California, first paragraph.

XVI.

Appellee Concedes That Double Jeopardy, Which Was the Sole Basis for His Original Petition Which Brought About the Order to Show Cause, Is No Longer at Issue in This Matter (Appellee's Br. p. 40, lines 21, 22).

Neither do appellants agree with the appellee's conclusion as to the meaning of Section 2463, Title 28, United States Code Annotated, as previously indicated in this reply.

By the failure to reply to any of the points made by appellee the appellants do not thereby indicate concurrence in appellee's position. The matters have not been considered sufficiently important to present further argument since it is the contention of appellants that all of the matters raised in appellee's Brief have previously been covered in one manner or another by appellants' Opening Brief. This note of caution is added in order that appellants will not be considered to have waived any of their position as stated in the Opening Brief.

Wherefore, appellants pray that the position they have presented be sustained by this court; that the action of the trial court in issuing a permanent injunction against appellants be reversed, and that the trial court be ordered to dissolve its injunction, and to refrain from further interference in the processes of the State court.

Respectfully submitted,

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